Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Andrew Bestor

Petitioner

v.

Joseph Lieberman et al.

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the District of Columbia

PETITION FOR WRIT OF CERTIORARI

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Questions

At issue is information in the government's possession about Appellant Bestor, and Bestor's use of statutory requirements to make them identify and preserve the information whether or not he can immediately gain access to it.

1. Can a *pro se* litigant use statutory entitlements in the Freedom Of Information Act [5 USC 552] and United States Code governing security agencies [50 USC 401 et seq.] to overcome a District Court's use of discretion in denying his motion to add a defendant under Rule 15 [a government agency already recognizing Bestor's right to act against them in district court], when adding the defendant would aid the *pro se* litigant 'in his cause' [as that cause evolved over the course of the litigation]?

2. Captioning "Unnamed Co-participants" as defendants and precisely describing the activity including with evidence attachments, was the Court's refusal to add – or recognize – the National Security Agency as a defendant discretionary to begin with once Bestor fulfilled the Title 5 requirement? Beyond the issue of 'who defines and redefines the *pro se* litigant's cause over time' and evidence Bestor 'hopes to preserve' raised in the first Question, does the preponderance of specialized evidence he did have [in addition to the defendants contributing activity precisely described in the Complaint] erode the Rule 15 bar, and if Bestor – *pro se* – did not know how to maneuver the evidence, did the Court plainly err in failing to hear him on it or otherwise consider the combination of evidence and activity in the light most favorable to his cause?

3. The Court of Appeals squarely recognized the issue but denied Bestor opportunity to petition in granting summary affirmance. Is that deprivation sufficient to trigger review of the appellate process by the Supreme Court?

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Parties

Appellant Bestor acts against two United States Senators and attempts to expand his action to include the National Security Agency.

Statement of Jurisdiction

Order accompanying Memorandum Opinion, Mar 11, 2005. Appeal of that Opinion [September Term 2005] denied, Jan 23, 2006. Petition for Panel Rehearing and Rehearing *en banc* denied, Apr 25 2006 [all opinions attached in appendix].
The controversy centers on Fed R. Civ. P. 15(a) or "Rule 15" in the United States District Court and Court of Appeals for the District of Columbia, attempting to access protections in 50 USC 401 et seq.

Concise Statement of the Case

In a sequence of litigation before the [same] district court, Bestor attempted to submit oversized evidence [MRIs] illustrating aspects of a radiation-based neuroprosthetic technology used in attacking him [*Bestor v. United States*, 02-cv-00279 RWR], and Bestor tried to fully image the technology [*Bestor v. Ashley* 02-cv-01583 RWR].

The immediate case at bar, *Bestor v. Lieberman* 03-cv-01470 RWR, has a tortured history including previous review by this Court over reassignment [interlocutory appeal 03-5295 denied, cert. denied 125 S.Ct 64] but the salient points here can be quickly summarized.

Bestor filed his Complaint [Docket 1] on July 03 2003

against Kennedy and Lieberman, alleging with great specificity that Kennedy had assaulted him or significantly participated in the activity on July 21 2002, Sept 18 2002, Oct 13 2002, and May 06 2003 [Complaint para. 10~13], and Lieberman had assaulted him May 18 2003 [para. 14]. Bestor went on to describe related technologies and processes [essentially data handling] working toward 'files and systems of files' though his nomenclature may not be identical to Government or agency nomenclature.

Bestor noted additional Lieberman participation in the activity on Oct 02 2003 and Oct 12 2003 in his filing 21 Response To Motion To Dismiss, Dec 17 2004 at page 34.

Undertaking specialized research, related surveys of peer reviewed literature and general media, and interaction with the 'constituent community' both at National Institute of Health researcher gatherings and in seeking out similar cases [often revealed in some combination of litigation and activism - Bilyeu and Hicks], Bestor's 'situational awareness' has greatly increased as time progressed. In his filing 17 Motion To Add National Security Agency as a Defendant, Nov 01 2004, he [Bestor] sought to expand the case and he attached the requisite documentation – a letter from the National Security Agency authorizing his action in the District Court – to the filing.

Without acting on his 17 Motion to add the National Security Agency, on Nov 29 2004 at 19 the District Court made Bestor respond to the defendants motion to dismiss, and Bestor dutifully tried to comply in submitting his 21 Response to the Motion to Dismiss.

Bestor notes the difference between the 19 *Strickland* warning here and the *Strickland* warnings issued in the

previous cases was a factor contributing to his confusion; adding the additional Lieberman participation of Oct 02 2003 and Oct 12 2003 in his filing 21 Response To Motion To Dismiss at page 34 should have been sufficient for a trial without reference to any technology *or* the National Security Agency but merely on the basis of a 42:1986 Complaint. Nonetheless, thinking the District Court would take into consideration his
1. previous attempts to submit oversized evidence as well as
2. the action he took to image the technology in *Ashley*
3. beyond the sketch and
4. documentation he provided with his Complaint 1, noting
5. by the time the opinion here issued in 2005 the District Court should have also understood both that imaging the microscopic wire of the neuroprosthetic is very possible and that imaging the microscopic wire requires the Court's assistance which Bestor described [1 para. 25 at page 16] and applied for with a proposed order at 1 page 21 which was docketed in the evidence attachment as page 2. as well as 10 NOTICE Alert and 11 RESPONSE (Opposition) and elsewhere [MRIs are obtained by medical prescriptions which are regulated by the Food and Drug Administration; however worthy the cause, getting a medical doctor to depart from those guidelines will take force].
Bestor tried to provide the larger context required beyond "allegations or conclusory statements" *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir.1999) which the Court ultimately said was not persuasive in dismissing his complaint without discussing the National Security Agency.

Meanwhile Bestor is still being attacked, though no longer by the captioned defendants Lieberman and Kennedy [July 02, July 04, July 08, 2006]. Understanding that, like most *pro se* litigants he may not immediately articulate his arguments very well, what Bestor was hoping to do was invoke the

doctrine of "capable of repetition yet evading review" defined by *Beethoven.com LLC v. Librarian of Congress* 364 U.S. App DC 295, 394 F.3d 939 – precluded when the Appeals Court did not permit him to petition. He knows he's being radiated – assailants are blatant; but he also knows by now there is some kind of game going on and he may not be able to immediately *obtain* the supporting documentation. Can he use it anyway? The question is whether or not Bestor can move data, files, imaging sequences – electronic documentation products he can describe – into an administrative structure allowing him to evade estoppels, work toward a *Vaughn* index, and force the assailants to show their cards on judicial review or at least save the cards in a defined manner lending some consistency to process.

In the past, Government agencies have deliberately destroyed data to escape liability, Bestor referencing the infamous – and for them, humiliating – exchanges between Stansfield Turner and the United States Senate over destruction of MKULTRA files supposedly undertaken by Richard Helms and Sidney Gottlieb which we now know was simply a lie [Joint Hearing Before The Select Committee On Intelligence And The Subcommittee On Health And Scientific Research Of The Committee On Human Resources, United States Senate, Ninety-Fifth Congress, First Session, August 3 1977 at pages 46-47 for example]. Those exchanges might set a standard in the 'worst-case' outcome.

Bestor came to this Court previously with a Third Amendment petition in *Bestor v. United States*, cert. denied 123 S.Ct 2257, rehear denied 124 S.Ct 24. Moving into provisions of the 50 USC 401 et seq. guarantees can be expected to provide some kind of judicial oversight working towards a *Vaughn* index as – if not a 'best-case' outcome – an interim structure with a view to the future and basis for

discussion among competing interests ['private bill' legislative functions as opposed to court processes for example]. Better than 12(b)(1) or 12(b)(6) dismissed by the District Court as "essentially fictitious" [Opinion at 7].

Bestor immediately tried to appeal dismissal of his Complaint 1 [Opinion attached] to the United States Court of Appeals for the District of Columbia, but was not permitted to petition. While that court certainly recognized Bestor's attempt to name the National Security Agency as a defendant in the District Court record [and referenced *Foman v. Davis*, 371 U.S. 178], they evaded the issue of Bestor's FOIA and 50 USC 401 et seq. entitlements in summarily affirming dismissal of the Complaint [Opinion attached].

Failing in his effort to obtain panel or *en banc* rehearing of the point in the Court of Appeals, Bestor now petitions this Court for a Writ of Certiorari.

Argument

As far as Bestor can figure out, in considering his Complaint the District Court was obligated to accept his allegations as true or in the light most favorable to Bestor [*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248] until – at some unspecified point which to this day remains a mystery to him – he crossed into the land beyond the invisible Rule 12(b)(1) line and 12(b)(6) line and the District Court snapped.

The sixteen ton weight falls on Wiley Coyote.

All or nothing, Bestor is attacked by others using a radiation technology [same as Sheila Bilyeu in *Bilyeu v. Clinton et al.*

1:00-cv-02290 RWR becoming *Bilyeu v. Federal Government* 1:01-cv-00321 RWR appeal 02-5008 denied, and Gloria Hicks in *Hicks v. National Security Agency* 04-cv-01586 GK, appeal 04-5362 denied, all in the District of Columbia with both Bestor and Bilyeu before the same court, but as his filings are more concise than theirs lets stick with *Bestor* for the moment] and the District Courts don't say they'll hear so much up to such-and-such a point. "We're ready to talk about 'garage door opener' types of technology or the remote controls for VCRs and televisions but we're not ready to talk about cell phones," or "we're ready to talk about early cell phones but not the fancy kind that take pictures and have internet access" though Bestor has gone some distance in documenting the technology.

Turning something on and off from a remote location – in this day and age it ain't orbiting the moon.

In 1992 a man with poor written English language skills tried to litigate the underlying circumstance and it may have sounded far fetched at the time – for whatever reason, Wald, Henderson, and Randolph of the United States Court of Appeals for the District of Columbia wrote the poor man's plea for mercy into an opinion [*Best v. Kelly*, 39 F.3d 331 n.3, Randolph opinion] otherwise about convicts' interests in rehabilitation services, and other judges seize on that to disparage everybody else who is similarly attacked.

Point blank, the District Courts don't want to hear any of it. "[P]laintiff's claims are plainly fanciful" [Opinion page 1] which is mild next to the deliberate exaggerations in *Hicks*. In rebuttal Bestor claims that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential," *Wisconsin v. Constantineau*, 400 U.S.

433, 437 [further citations omitted].

Common sense and this Court's previous rulings would recognize such an 'all or nothing' stance on the part of the District Courts is farcical to begin with not to mention probably discriminatory against *pro se* litigants - addressing surveillance technologies, "we need not here contemplate the Fourth Amendment implication of these and other frightening paraphernalia which the vaulted marvels of an electric age may visit upon human society," *Silverman v. United States* 365 U.S. 505 at 509 (1961) - but typically in the District Court common sense doesn't count; all that seems to matter is law and process. Until, that is, the law and process is entirely discretionary, as District Courts represent the invisible boundaries of Rule 12(b)(1) and 12(b)(6) territory as being when they seize "essentially fictitious" and "plainly fanciful."
A patriotic American, Bestor *should* stand right here as a college educated middle class white male representing a class of people who tend to be poor, certainly under attack, often on the run – rare is the serious radiation torture story that doesn't include living in either an automobile or homeless shelter – and generally disenfranchised;

however invidious the activity is at an individual level [Gloria Hicks – 64 year old black woman tortured in Glenarden Maryland with electricity periodically slammed through her vagina] the larger story is one of government agencies eroding and evading legislative oversight,

but beaten down by law and 'process' Bestor does not attempt such a direct assault. Instead Bestor tried to salvage protections which are guaranteed him in the United States Codes [5 USC 552 and 50 USC. 401 et seq. specifically 50 USC 432b Operational files of the National Security

Agency (f) Allegation; improper withholding of records; judicial review, and (g) Decennial review of exempted records], effectively leading into the Rule 15 controversy.

An important aspect of Bestor's argument is that the entitlements or guarantees in 50 USC 401 et seq. should end the disparaging treatment originating in the *Best* note which disadvantages *pro se* litigants who are being attacked including in the District Courts whether or not the litigants themselves immediately obtain information relevant to their situations from the applicable agencies.
Other side of the same coin – right now the Assistant United States Attorneys – and the legislators they here protect - are no more than liars in denying the situation exists, and hopefully this maneuver will restore some small measure of dignity to their offices.

Uncontested. The defendants and the United States Attorneys representing them have never attempted to enact a secrecy requirement of any kind in *any* of the numerous court actions arising from these matters. *United States v. Reynolds* 345 U.S. 1, 73 S Ct 528, 97 L.Ed 727 (1953) is the origin of modern process in secrecy and it sets very clear standards articulated in *In re United States* 872 F.2d 472, 478 (D.C. Cir 1989). [A] court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role. "Judicial control over evidence in a case cannot be abdicated to the caprice of executive officers." *Reynolds* at 73 S. Ct 532-33 by way of *In re US* 872 F2d 475. "Plaintiff's claim did not present a case where 'the very subject matter of the litigation is itself a state secret.' "*Id* 478.
Shameful discrimination against Bestor and others similarly situated. *Rethinking Embattled Tactics in Terror War: Courts, Hill and Allies Press Administration*, Dana Priest,

Washington Post, July 11 2006, front page cont. page A8. "The American Civil Liberties Union has filed a lawsuit in Detroit.... on behalf of scholars, lawyers, journalists and nonprofit groups challenging the National Security Agency's domestic eavesdropping program.... The Justice Department so far has persuaded many judges to dismiss such suits, along with those challenging the CIA's "rendition" program, under the "state secret privilege," which argues that allowing a case to proceed would damage national security.
We get disparaged and *ex-parte* communication – they at least get real process. At this late date an effort to invoke a secrecy privilege here would be well beyond far fetched to say the least.

Effectively in the absence of a secrecy requirement we are in striking distance of the technology at least before the District of Columbia circuit, citing to *Metro-Goldwyn-Mayer Studios Inc. v Grokster LTD* 380 F.3d 1154 at 1167, "We live in a quicksilver technological environment with courts ill-suited to fix the flow of [there 'internet'] innovation."

Freedom Of Information Act 5 USCS 552(b), noting the Act "does not apply to matters that are - (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order" noting "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection," Bestor emphasis claiming whatever the outcome is, that structure is meant to protect him and the District Court's opinion was unduly disparaging.

In some instances relevant technologies and circumstances have even been given considerable publicity. Sheila Bilyeu

tried to action that as derogatory [it was about her] in *Bilyeu v Oklahoman / Oklahoma Publishing Company (OPUBCO)*, Case No. CIV-04-1428-R, No 05-6010 United States Court of Appeals for the Tenth Circuit. The technology received front page treatment in the *Washington Post* May 16 2005, *Inventing Our Evolution* with an illustration – 'Cyberkinetics, a Massachusetts technology research company, developed a device that, implanted in a paralyzed patient, would let him "think" computer commands' going on to discuss the Defense Advanced Research Projects Agency or DARPA; more recent and even more blatant reference in the *Washington Post* May 1 2006 page A17. Sens. **Arlen Specter** (R-Pa.) and **Jeff Sessions** (R-Ala.), on their recent trip to Latin America , picked up some unusual suggestions in a chat with Columbian President **Alvaro Uribe** [ ] according to an account Specter put in the Congressional Record [ ] about seasonal workers who didn't return home. "President Uribe said he would consider having Columbian workers have microchips implanted into their bodies before they are permitted to enter the United States to work on a seasonal basis," Specter reported [*Post* highlighting]. Bestor goes so far as to speculate his matters have fueled the pervasive documentation in media – that might otherwise seem an unusual point for Senator Specter, head of the Senate Judiciary Committee, to put in the Congressional Record. Evidence attachments with Bestor's 1 Complaint included citations to medical journals and DARPA funded research; evidence in his 21 Response at pages 8 to10 included neuroprosthetic case-specific literature on Allard Lowenstein and Dennis Sweeney, working into CIA MKULTRA documentation and general media surveys.

The neuroprosthetic device originated in MKULTRA Subproject 119 research undertaken at Texas Christian University which Bestor noted in his 21 Response at page 11

– that ain't a mystery. CIA provided data on that.

Judicial Watch, Inc v Dept of Justice 365 F.3d 1108, 361 U.S. App DC 183, "Both deliberative process privilege and presidential communications privilege are qualified discovery privileges that can be overcome by sufficient showing of need." Whatever the Assistant United States Attorneys are saying *ex-parte* isn't good enough.

Uncontested. Others before the United States District Courts for the District of Columbia certainly claim to be similarly situated – Gloria Hicks in Glenarden Maryland suffering hugely painful attacks ongoing across the duration of this litigation; perhaps most famously Sheila Bilyeu who ran for the United States Senate in Oklahoma which is how Bestor found out about her case. 'They' – government security agencies acting in a malicious manner - attacked Bilyeu including with media and Bestor saw it, noting a description intended to ridicule Bilyeu in Oklahoma mentioned the very same judge [the Honorable Richard W. Roberts, Memorandum Opinion appendix] who has been reviewing Bestor's cases in Washington. Turns out Bilyeu traveled and had tried to act in the District of Columbia.
Assistant United States Attorneys uniformly argue the cases should all be dismissed including under Rule 12(b)(1) and 12(b)(6), but no one denies the claims are being made, in fact the one court either obligingly or mockingly providing the reference back to *Wilson* circa 1992 in *Best v Kelly*, 39 F.3d 331 n.3 circa 1994.
Bestor – ultimately [belatedly] joined by Bilyeu to no avail – tried to get that point recognized via a 28 USC 372c allegation of judicial misconduct [clumsy shield to try to use against assailants on the other side of the judge], which in the interim had changed to a 351c filing and instead of being generous in reading it as renumbered the clerks engaged in

correspondence with Bestor which additionally tolled, but the point is that the District Courts in the District of Columbia were by no means naive in the situation by the time the opinion issued here.

Related. Bestor is attacked by numerous assailants, two of whom – Kennedy and Lieberman – he recognized and knew to be squarely in the reach of the District Court. Other litigants have not been so luck, both in that they tend to be attacked by people they don't know and the conspirators they can see are oblique in participation. In this case the named defendants are caught square in the headlights.

Evidence Issues

The Evidence He Has and the Evidence He Hopes To Get

In its opinion dismissing his Complaint, the District Court said "First, plaintiff does not bring forward any evidence to support his baseline allegations" [page 5] and "He cites, for example, a drawing and several studies and articles on neuroprosthetic systems, but none of these suggests that the government is using neuroprosthetic systems in the way that the plaintiff claims, much less that plaintiff himself has been targeted" [page 6]. Infuriating to Bestor, in a city with both a Holocaust and Spy museum that comes across as absurd – Bestor has attempted to educate the court in the technology certainly in his 1 Complaint and his 21 Response because he is being targeted; were he not being targeted of course he wouldn't know they were doing it. Bestor certainly did cite other cases which suggest the Government is using neuroprosthetics the way he claims – Dennis Sweeney shot Allard Lowenstein exactly over that with prominent coverage in the *New York Times* [21 at pages 8-10]; perhaps the judge gave it to a clerk and never read it.

At a more formal level, the point in the opinion is only remotely true because in *Bestor v United States* 1:02-cv-00279 RWR, previously before the same court, Bestor tried to submit oversized evidence on Apr 19 2002 at 19 MOTION For Leave To File *oversized evidence in opposition to defendant's 4/15/02 motion for dismissal by pro se* ANDREW BESTOR (nmr,), definitively showing at least elements of the neuroprosthetic system but denied by the District Court.
The whole idea behind his next action, *Bestor v. Ashley,* was imaging the system, again denied.
Somewhat disparagingly the opinion does note the "drawing" Bestor made with the assistance of an obliging assailant energizing the electrodes [over-stimulating to result in sensation] which Bestor sketched out. Imaging the microscopic wire will require deviation from established [FDA approved] MRI procedures and Bestor has *repeatedly* sought the District Court's assistance on that [at least at 1, 10, and 11]; never ruling on any of his motions, for the District Court to turn around and say he doesn't have evidence is extremely disingenuous. Bestor can't rip it out barehanded.

What Bestor actually did was provide evidence attachments with his 1 Complaint [including the work of Giles Brindley pages 3-13 and Chapin/Nicolelis pages 16-37, which are definitive works in the field – Bestor admittedly did not know how optimum they were when he submitted them], there had been at least one more 'similar but unrelated' complaint immediately before the District Court [*Bilyeu*] which was embarrassingly raised repeatedly in the course of ironing out the 372c to 351c misunderstanding,
and Bestor provided evidence of others being similarly attacked in his 21 Response including by people significantly associated as least with defendant Kennedy – namely Allard Lowenstein. In fact Bestor provided a history of it, spanning

a decade, and he [Bestor] claims the evidence he provided, combined with the known history and the affiliation with Kennedy who was precisely defined in the Complaint erodes the discretion the District Court really had in issuing an opinion on the Rule 15 motion.
Bestor's second question – captioning "Unnamed Co-participants" [the court understanding the list was going to grow] in an action taking place across several years should anticipate some increased awareness – typically with the court's assistance but in the *pro se* cases here without the court's assistance. Once Bestor filled his FOIA requirement how much discretion did the court really have, and if he did not know how to best maneuver his evidence wasn't the court suppose to do that for him?
Bestor has absolutely no idea what a judge is suppose to teach a law clerk, and by now thinks somewhat disparagingly of judges who earlier clerked for other judges – wouldn't it be better to bring them in cold from the outside?

50 USC 432b Operational files of the National Security Agency (f) Allegation; improper withholding of records; judicial review.
Bestor should have gotten that. Even though 'it' – technology and operations - isn't secret or at any rate the Assistant United States Attorneys have never here or anywhere else claimed it to be secret [insulting but never secret] Bestor has never gotten a *Vaughn* index; if he can't force a *Vaughn* index however redacted he should have at least gotten the judicial review which may result in obtaining a *Vaughn* index or modification of the Opinion. Truth of the matter is that not all the evidence should be equally treated – some elements of the broadcast technology Bestor referenced in his 1 Complaint at para. 24.f. may be 'high tech' – the antennas with tracking capability and frequency modulator, sampling the data bit rate blah blah blah, but most evidence will be

electronic files of movies which are intended to harass Bestor with index or check list of what's been shown and what's upcoming. The District Courts probably do not *want* to undertake a 50 USC 432b(f) process here given the volume of the material, and the National Security Agency almost certainly does not *want* to undertake the 50 USC 432b(g) Decennial review of exempted records process because it means they'll have to save everything, but in *Bestor* that is literally the only difference between a system of Government with protections for the citizen and rouge agents who simply run amok.

Of course the question is whether or not Bestor has a route through Rule 15 to reach the National Security Agency. Particularly after he noted other defendants existed – "Unnamed Co-participants" - as captioned in his Complaint, Bestor claims his effort to add the NSA as a defendant is supported by rather than diminished by *Foman v. Davis* 371 U.S. 178 which was cited by the Court of Appeals in summarily affirming dismissal of his Complaint.

Foman

"The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principal that the purpose of pleading is to facilitate a proper decision on the merits."

Technically Bestor's effort to add the National Security Agency as a defendant was a narrow effort to amend his Complaint, and that is what *Foman* addresses.

Reality counts. In that case, faced with some confusion [worse than here - two notices of appeal], '[t]he defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the denial of the motions as an

effective, although inept, attempt to appeal from the judgment sought to be vacated. Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest. Not only did both parties brief and argue the merits of the earlier judgment on appeal, but petitioner's statement of points on which she intended to rely on appeal, submitted to both respondent and the court pursuant to rule, similarly demonstrated the intent to challenge the dismissal. It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principal that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48. The Rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action." Rule 1. [Bestor emphasis].

The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate the judgment in order to allow amendment of the complaint. As appears from the record, the amendment would have done no more than state an alternate theory of recovery [in the case at hand, moving evidence into a judicable structure/preservation mechanism whether or not Bestor can immediately gain access to it perhaps through a *Vaughn* index].

Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally 3 Moore, Federal Practice (2d ed. 1948), para. 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claims on the merits. In the absence of any apparent or declared reason – such as

undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the amendment, futility of the amendment, etc. – the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise in discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.' [Bestor emphasis].

The opinion of the District Court is in the appendix, and it is very clear Bestor's filing 17 Motion To Add National Security Agency as a Defendant, Nov 01 2004 was not at all considered.
Of course Bestor wants a *Vaughn* index, and got the letter in which they said they didn't have anything on him under both the Privacy Act and Freedom Of Information Act authorizing action.

Whether or not the District Court ever gets him the *Vaughn* index he hasn't been able to secure on his own, and whether or not information secured from the National Security Agency sufficiently meshed with the activities Bestor claims the captioned defendants were engaging in to make his complaint actionable in the view of the District Court which has not been favorably disposed to him in the past, as an entitlement Bestor could assert process rights under 50 USC 432b Operational files of the National Security Agency (f) Allegation; improper withholding of records; judicial review, and (g) Decennial review of exempted records. "See you in ten years, you #&*^@!!" (or worse). That's way better than 12(b)(1) or 12(b)(6) dismissed as 'crazy.'

Bestor is in a terrible predicament. These really are the last ditch technicalities; literally 50 USC 432b(f) is leading the horse to water, (g) even if you can't make it drink. He should have gotten at least a *Vaughn* index, and if media wasn't so manipulated – as Sheila Bilyeu tried to action in *Bilyeu v Oklahoman* - undergraduates would be on the barricades but here we are, and this Court shouldn't leave Bestor empty-handed. He'll take "segregable portions of the records."

There was sufficient reason for the District Court to allow captioning of the National Security Agency as a defendant in Bestor's immediate case. Was denial a *deprivation*?
Although the precise requirements of due process depend on circumstances, *Morrissey v. Brewer*, 408 U.S. 471 [other references omitted] (1972), the fundamentals remain constant: to deprive an individual of a protected interest, the Government must provide adequate notice and a "meaningful" opportunity to be heard, *Mathews v. Eldridge*, 424 U.S. 319, 333 [other references omitted] (1976). Except in "extraordinary situations where some valid Government interest is at stake that justifies postponing the hearing until after the event," the Government must provide the hearing before the deprivation takes place. *United States v. James Daniel Good Real Property*, 510 U.S. 43 [other references omitted] (1993).
To determine whether due process demands a pre-deprivation hearing, we consider three factors: "the Government's interest," "the private interest affected by the official action," and "the risk of erroneous deprivation of interest through procedures used, as well as probable value of additional safeguards" provided by a pre-deprivation hearing. *James Daniel Good*, 510 U.S. at -----, 114 S.Ct. at 501, in *James Madison Ltd., By Hecht v. Ludwig*, 82 F.3d 1085 at 1099 (D.C. Cir 1996).

The immediate case was in the District Court, but the idea is that there is a protective structure in the District of Columbia circuit, and the District Court goes too far in dismissing Bestor, *pro se* petitioner.

This Court faces at least one real life question.
In cases like Bestor's
where the agencies,
for invidious reasons or otherwise,
are taking extreme actions in radiating people

– which everybody is ducking; it ain't the law and a hopeful possibility is that left unaddressed it will ultimately so erode credibility of the courts as to *force* reform [but meanwhile fuels what is effectively 'sanctioned' corruption]–

should the lower courts mandate the 50 USC 432b (f) judicial review and (g) Decennial review, or instead try to leave the litigant with a heavily redacted *Vaughn* index to push forward and back as best they can. Rare is the radiation torture story which doesn't involve sleeping in a car or a homeless shelter – at least a redacted *Vaughn* index is something you can show the cop who comes to make you move the car.
Bestor doesn't know what the answer is – he's never been able to get the *Vaughn* index, and in the face of that depravation insists on asserting at least 50 USC 432b.

Bestor is hopeful that in his case – which is substantial – the Title 50 requirements bring the Agency to its knees, begging *him* for mercy and attempting to mollify him with a *Vaughn* index; the leveraged Title 50. *Vaughn* with highlights.
Bottom line: in another case a litigant trapped a deployed surveillance operative into revealing the existence of a domestic surveillance mechanism called Home Guard

Security which apparently parallels the protective Homeland Security Agency, and that operative designated specific satellites backing in to the National Security Agency but Bestor is careful not too go to far, and only actions activity and technologies effectively made public in the *New York Times, Washington Post* and *Oklahoman*, his 1 Complaint with 40 page evidence attachment and 21 Response. Bestor is not at all attempting to weaken the government security agencies but they very clearly can be more responsive and accountable than they have been. People should not be assaulted and radiated, and their solution – evasion – has only diminished the courts and legislative branch.

The other litigation – never under seal; *Hicks, Bilyeu, Wilson* [published in the 1994 *Best* opinion which makes it a little awkward to classify now, racing through law libraries tearing that page out] and a number of other cases online - are not classified. Bestor literally wants to secure information about himself to shield himself; right now it's indexed in a NSA vault which they presumably identify to the judge – evidence at least for the courts whether or not Bestor can get all of it. Perhaps he can get some with iterative reviews of a *Vaughn* index for example; it is from known and defined agencies rather than shadowy mechanisms or composite structures.

Pro bono Bestor would certainly claim that in actioning other types of civil complaints the District Courts do not insist on complete descriptions of the invidious undertakings which would be effectively preclusionary for people like Bilyeu who has been assaulted over decades by different people using various technologies and communication methods; here Bestor argues only for himself in claiming in this matter the District Court erred in failing to add or even discuss the National Security Agency as a defendant in dismissing his Complaint, and the United States Court of Appeals for the

District of Columbia similarly erred in recognizing Bestor's effort but granting summary affirmation at the very same moment – without allowing *pro se* litigant Bestor an opportunity to explore the arguments in petitioning for relief. Particularly after he noted other defendants existed – "Unnamed Co-participants" - as captioned in his Complaint.

Many *pro se* litigants may allege the district courts are unduly harsh; trying to avoid being endlessly returned to the same court Bestor tried to determine 'of all reassignments what percentage of reassignments concern *pro se* litigants' in a letter to the clerk of the District Court dated Dec 18, 2003. In a reply dated Jan 27, 2004 Ms. Nancy Mayer-Whittington, Clerk of the District Court, said that information does not exist and apparently cannot be easily discovered. End of the day, Bestor forever returned to the same court [definitive in the District of Columbia, see *Bestor v. Lieberman* 91 Fed Appx 156 by Ginsburg, Setelle and Garland] he argues his previous efforts should be fairly considered instead of always held against him. The issue having been raised, Bestor would additionally ask what percentage of *pro se* civil complaints are ultimately heard in the District of Columbia, suggesting some metric is long overdue.

Of the people attacked – there are others, but for the sake of the argument here Bestor, Bilyeu, and Hicks – Bestor is the only one firmly enough in place to fulfill the procedural requirements of the Title 5 Freedom Of Information Act, which represents a barrier to the others who were denied protections which Bestor claims should have been afforded them all under 50 USCS 432b Operational files of the National Security Agency (f) Allegation; improper withholding of records; judicial review, and (g) Decennial review of exempted records.

Has he made it across the great divide – if the District Court had allowed him to add the National Security Agency to his Complaint as a defendant – would Bestor have survived? Under 50 USC 432b(f), the National Security Agency does not have to turn over "operational files" which are defined as "files of the Signals Intelligence Directorate of the National Security Agency [ ] that document the means by which foreign intelligence or counterintelligence is collected through technical systems." They may or may not have to show the technology ["means" and "technology systems"], but that is not the home movies – some borderline pornographic – used to attack Bestor or the indexes of image and audio sequences, or coordination of the attacks on Bestor which Kennedy and Lieberman were involved in. The technology literally is not secret and the public will certainly benefit from disclosures if Bestor can get it. Anyhow it ain't 12(b)(1) and 12(b)(6) dismissed as "delusional." The Rule 12(b)(1) ~~and the Rule~~ 12(b)(6) "Section 8" which may have been an Allen Dulles joke or plot to weaken the legislative and judicial branches. If Bestor can evade estoppels he can survive. The agencies – all of them - will cry, deny, and lie; "[w]e believe, however, that the government overstates its case." *In re US* 872 F2d 475; particularly insofar as the activities and technologies are freely discussed elsewhere and have been covered in the *Washington Post* and other newspapers. Bestor claims a judicial review process would have certainly changed administrative aspects of his predicament and both District and Appeal Courts erred.

He prays for reversal.

Respectfully submitted,
Andrew Bestor

APPENDIX

OPINIONS BEING APPEALED

DISTRICT COURT

United States District Court For The District of Columbia
Andrew Bestor, Plaintiff,
v.
Joseph I. Lieberman, et al., Defendants.
Civil Action No. 03-1470 (RWR)

MEMORANDUM OPINION

Plaintiff, Andrew Bestor, has filed suit against Senators Joseph I Lieberman and Edward M. Kennedy alleging that they are involved in the irradiation of his brain and manipulation of his thought processes via devices surreptitiously implanted in his head. Defendants have moved to dismiss plaintiff's complaint, arguing, *inter alia*, that this court lacks subject matter jurisdiction under Federal Rules of Civil Procedure 12(b)(1). Because plaintiff's claims are plainly fanciful, the court lacks subject matter jurisdiction over his complaint and defendants' motion to dismiss will be granted. Moreover, plaintiff's motion to amend his complaint will be denied as futile because the proposed amendment would not survive a motion to dismiss.

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BACKGROUND

Plaintiff alleges that while in Tokyo, Japan from 1992 to 1996, he was drugged and kidnapped from his apartment, and that a system of neuroprosthetics was implanted in his skull and brain. [Compl. at 1] Plaintiff asserts that the implantation was "very likely [performed] by the Japanese consulting with the 'CIA-affiliated' Peter Bourne," and that

he suspects that the "microscopic wires in [his] skull were manufactured by the University of Michigan. (Opp'n to Mot. To Dismiss at 21.) The neuroprosthetics allegedly allow remote human operators the capability to, among other things, induce image and audio sequences in plaintiff's brain. (Compl. at 2.) Plaintiff claims that Senators Kennedy and Lieberman have at various times been featured in these alleged images. (See id. at 4–7.)

Plaintiff alleges that by appearing in the video images in his head, Senators Kennedy and Lieberman act in violation of the Eight and Thirteenth Amendments, 42 U.S.C. SS 1985 and 1986, and 18 U.S.C. SS 1961. Although it is difficult to discern the precise relief that he seeks, it appears that plaintiff wants to obtain information that would help him understand in greater depth the operation he describes, in which he alleges the defendants are complicit. (Id. at 10, 12, 15-16.)

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Defendants have moved to dismiss the case, claiming, among other things, that the court lacks subject matter jurisdiction over plaintiff's complaint under Rule 12(b)(1), and that plaintiff has failed to state a claim upon which relief can be granted under Rule 12(b)(6).

DISCUSSION

I. SUBJECT MATTER JURISDICTION

If a court lacks subject matter jurisdiction over an action, the action may not be maintained. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause.") "Federal courts are without power to entertain claims otherwise within their jurisdiction if they are so attenuated and unsubstantial as to be absolutely devoid of merit, wholly unsubstantial, [or] obviously frivolous[.]" Hagans v. Lavine, 415 U.S. 528, 536-37 (1974) (citations and internal quotations omitted). A complaint will be dismissed for lack of subject matter

jurisdiction when it is "'patently insubstantial,' presenting no federal question suitable for decision." Best v. Kelly, 39 F.3d 328, 330 (D.C. Cir. 1994) (quoting Neitzke v. Williams, 490 U.S. 319, 327 n.6 (1989). Claims are patently insubstantial if they are "essentially fictitious," that is, if, for example, they advance bizarre conspiracy theories," or allege "fantastic government

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manipulations of [one's] will or mind." See Best, 39 F.3d at 330; see also Carone-Ferdinand v. CIA, 131 F. Supp. 2d 232, 234 (D.D.C. 2001); O'Connor v. United States, 159 F.R.D. 22, 25 (D. Md .1994).

Plaintiff's allegations of government manipulation of his brain and mind are essentially fictitious and frivolous. In Best, the D.C. Circuit cited the following allegation in Wilson v. United States Federal Government, Civ. Action No. 92-2159 (D.D.C. 1992), as "frivolous":

Years ago a Secret Branch of the Federal Government Put me under. This Branch of the Government, took my Face off my Head, went into my Scull & Put a Computer Chip of some kind & a Camera System which makes me Project Images or Pitchers, many Feet in Front of me. This was done to me without my Written Permission or any kind of Signature. This was and is an Atrocity. This Atrocity that was committed against me, has caused Massive Interrogation & Cruel & Unusual Punishment Against me. The Atrocity that was committed against me is in all actuality Cruel & Unusual Punishment. I feel that the Government should be responsible for the Atrocity committed Against me.

See Best, 39 F.3d at 331 n.3. Plaintiff's claims that the neuroprosthetics allegedly implanted in his head allow human operators to monitor his thoughts and induce image and audio sequences in his brain, and that his irradiation

amounts to cruel and unusual punishment under the Eighth Amendment, are nearly identical to the claims in Wilson characterized by the D.C. Circuit as frivolous. As such, they are precisely the sort of

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claims that "present no federal question suitable for decision." Best, 39 F.3d at 330.

Moreover, in Carone-Ferdinand, the plaintiffs alleged that they were deprived in various ways of insurance policies, bank accounts, and other property through a conspiracy involving the Central Intelligence Agency, three former United States presidents, and organized crime families. Carone-Ferdinand, 131 F. Supp. 2d at 232-33. Finding the plaintiff's claims "essentially fictitious," the court dismissed the complaint under Rule 12(b)(1). Id. at 235. The court explained that the plaintiffs' claims could not be viewed as plausible because they were supported only by "one patently forged documents and self-serving declarations." Id. at 236. The court stated that "[o]n its face, the complaint appears to be the very type of 'bizarre conspiracy theory' that the D.C. Circuit has said warrants dismissal under Rule 12(b)(1)." Id. at 235.

As in Carone-Ferdinand, plaintiff's conspiracy theory is bizarre and unsupported by evidence and warrants dismissal under Rule 12(b)(1). First, plaintiff does not bring forward any evidence to support his baseline allegations – that he was drugged and kidnapped from his apartment in Tokyo and that neuroprosthetics were implanted in his skull and brain. This failure to support the foundation of his complaint "cast[s] doubt on [plaintiff's] entire case." Id. at 235. Second, the

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evidence that plaintiff does submit is wholly unrelated to *him personally*. He cites, for example, a drawing and several studies and articles on neuroprosthetics systems, but none of these suggests that the government is using neuroprosthetics

systems in the way the plaintiff claims, much less that plaintiff himself has been targeted. Because of the frivolous nature of plaintiff's claims and the lack of evidence presented in support of the complaint, plaintiff's essentially fictitious allegations present no claim over which the court may exercise subject matter jurisdiction. Accordingly, defendant's motion to dismiss will be granted. See Best, 39 F.3d at 330; Hagans, 415 U.S. at 536-37.

II. PLAINTIFF'S MOTION TO AMEND HIS COMPLAINT

Plaintiff filed a motion to modify his complaint, seeking to strike certain portions of his original complaint and add new language in support of his claims. While Federal Rule of Civil Procedure 15(a) dictates that leave to amend "shall be freely given when justice so requires," a district court may deny such a motion where the proposed amendment is futile. Foman v. Davis, 371 U.S. 178, 182 (1962); Nat'l. Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 945 (D.C. Cir. 2004). "Courts may deny a motion to amend a complaint as futile.... if the proposed claim would not survive a motion to dismiss." James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996); see also Robinson v. Detroit News Inc., 211 F. Supp. 2d 101, 114 (D.D.C. 2002) ("An

amendment would be futile if it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss.")(internal citations omitted). Plaintiff's proposed amended complaint does not appear to raise any new or different claims for relief and does not identify any additional grounds for subject matter jurisdiction over his claims. Rather, it advances more of the same frivolous and essentially fictitious allegations that deprive the court of subject matter jurisdiction over the complaint. (See, e.g., Mot. To Suppl. R. at 17 ("Subsequent interaction and

external indicators such as use of Jimmy Carter himself in an induced image sequence.... eventually led to the abrupt realization Carter himself had been implanted.")) Because "nothing in [plaintiff's] proposed amended complaint would change the fact" that plaintiff cannot establish that the court has subject matter jurisdiction over his complaint, plaintiff's motion to amend his complaint will be denied as futile. See Robinson, 211 F. Supp 2d at 115.

CONCLUSION

Because plaintiff's claims are frivolous and essentially fictitious, the court lacks subject matter jurisdiction over his complaint. Therefore, the defendant's motion to dismiss will be granted. Plaintiff's motion to amend his complaint will be denied because allowing plaintiff's proposed amendments would be

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futile. An appropriate Order accompanies this Memorandum Opinion.

Signed this 11th day of March, 2005.

Richard W. Roberts

United States District Judge

COURT OF APPEALS

United States Court of Appeals For The District of Columbia

No. 05-5191, September Term 2005, 03cv01470

Filed Jan 23 2006

Andrew S. Bestor, Appellant v. Joseph Lieberman, et al., Appellees

Before: Ginsburg, Chief Judge, and Sentelle and Tatel, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987)(per curiam). The district court properly dismissed the complaint for lack of subject matter jurisdiction because it is "'patently insubstantial,' presenting no federal question suitable for decision." Best v. Kelly, 39 F.3d 328, 330 (D.C. Cir. 1994) (quoting Neitzke v. Williams, 490 U.S. 319, 327 n.6 (1989), and Hagans v. Lavine, 415 U.S. 528, 536-38 (1973)). In addition, the district court did not abuse its discretion in denying leave to amend the complaint because amendment would have been futile. See Fed R. Civ. P. 15(a); Foman v. Davis, 371 U.S. 178, 182 (1962).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P.41(b); D.C. Rule 41.
Per Curiam [with initials]

United States Court of Appeals For The District of Columbia
No. 05-5191, September Term 2005, 03cv01470
Filed Apr 25 2006
Andrew S. Bestor, Appellant v. Joseph Lieberman, et al., Appellees
Before: Ginsburg, Chief Judge, and Sentelle and Tatel, Circuit Judges

ORDER
Upon consideration of appellant's petition for rehearing filed February 17, 2006, it is ORDERED that the petition be denied.

Per Curiam

For The Court: Mark J. Langer, Clerk
By: Michael C. McGrail
Deputy Clerk

United States Court of Appeals For The District of Columbia
No. 05-5191, September Term 2005, 03cv01470
Filed Apr 25 2006
Andrew S. Bestor, Appellant v. Joseph Lieberman, et al., Appellees
Before: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, and Griffith, Circuit Judges

ORDER
Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is ORDERED that the petition be denied.

Per Curiam

For The Court: Mark J. Langer, Clerk
By: Michael C. McGrail
Deputy Clerk

5 USCS Freedom Of Information Act 552(b) This section does not apply to matters that are –
(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;.....
Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of information deleted shall be indicated at the place in the record where such a deletion is made [Bestor underlining].